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No. 99-1171

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., THE ADVERTISING FREEDOM COALITION, and THE ADVERTISING CLUB OF NEW YORK, INC.,

Petitioners,

—v.—

RUDOLPH W. GIULIANI, in his official capacity as Mayor of the City of New York, THE CITY OF NEW YORK, GASTON SILVA, in his official capacity as Commissioner of the New York City Department of Buildings, and ALFRED C. CERULLO III, in his official capacity as Commissioner of the New York City Department of Finance,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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March 20, 2000

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ARGUMENT

The City of New York and its officials (collectively, "the City") argue that review should be denied because: (1) Petitioners' claim regarding a circuit split is premature; (2) the decision below is interlocutory; and (3) the decision below is correct. The City's arguments should be rejected and certiorari should be granted.

1. The City does not and cannot dispute that the Second Circuit's opinion in this case (as well as the Fourth Circuit's opinion in *Penn Advertising, Inc.* v. *Mayor and City Council*[1] and the Seventh Circuit's opinion in *Federation of Advertising Industry Representatives, Inc.* v. *City of Chicago*[2]) directly conflicts with the Ninth Circuit's decision in *Lindsey* v. *Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999), *amended by*, __ F.3d __, 2000 WL 149423 (9th Cir. Feb. 14, 2000). Nor does the City deny that the very fact of the resulting circuit split concerning the scope of federal preemption under the Federal Cigarette Labeling and Advertising Act ("FCLAA") undermines the policy of FCLAA of preventing "diverse, nonuniform, and confusing" cigarette "advertising regulations." 15 U.S.C. § 1331(2) (1994). Rather, the City argues that Petitioners' claim of conflict is premature in light of the Ninth Circuit's request for briefing on whether *Lindsey* should be reheard *en banc*. (Respondents' Brief in Opposition ("Resp. Opp. Br.") at 14) This point is now moot.

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[1] 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

[2] 189 F.3d 633 (7th Cir. 1999), *petition for certiorari filed*, 68 U.S.L.W. 3480 (U.S. Jan. 12, 2000) (No. 99-1172).

Three days after the City filed its Brief in Opposition, the Ninth Circuit ordered the issuance of the mandate in *Lindsey*. *See* Order for Mandate to Issue, Mar. 13, 2000, attached hereto as App. 1a-2a; Ninth Circuit General Order 5.5(c) ("If the [*en banc*] call fails to obtain a majority, the panel shall resume control of the case and no further *en banc* action is required"); *see also* Order for Reversal of District Court Judgment, Mar. 17, 2000, attached hereto as App. 3a-4a. The decision in *Lindsey* is therefore final. It is the law in the nine states within the Ninth Circuit and is in direct conflict with the law in the eleven states within the Second, Fourth and Seventh Circuits. A conflict of this magnitude on an issue of this significance is well worthy of this Court's review.[3]

2. The City's argument that this case is inappropriate for plenary review because the decision below is "interlocutory" (Resp. Opp. Br. at 14) is equally misconceived. The Second Circuit has said its piece on preemption. Regardless of the further course of proceedings in this

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[3] The City ventures that a 3-1 split shows too much agreement among the circuits to support review by this Court. Resp. Opp. Br. at 13. This Court's precedents suggest otherwise. *See, e.g.*, *Weisgram v. Marley Co.*, 120 S. Ct. 1011, 1016 n.2 (2000) (review granted to resolve 4-1 circuit split); *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (review granted to resolve 10-1 split). Urging rehearing in *Lindsey*, the United States emphasized that the circuit split here is one involving "an important federal statutory scheme in the context of an issue of substantial public concern," Brief of the United States as *Amicus Curiae* Regarding Rehearing *En Banc* at 16, while 19 *amici* States declared that the circuit split raises "questions of federalism and the scope of state and local government police powers that are of fundamental importance to the *amici* States." Brief of *Amicus Curiae* States Regarding Rehearing at 1. That—and the fact that the Second and Seventh Circuits disregarded this Court's controlling decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)—is precisely why *certiorari* in this case and *Federation of Advertising Industry Representatives, Inc.*, No. 99-1172, is warranted.

case, its preemption decision will remain in conflict with the Ninth Circuit's preemption decision in *Lindsey*. The conflict cannot be eliminated or resolved, except by this Court. Moreover, only by granting review in this case and *Federation of Advertising Industry Representatives, Inc.* (No. 99-1172) can this Court resolve the conflict between the Ninth Circuit's decision in *Lindsey*, as to which review will not be sought,[4] and the Fourth Circuit's decision in *Penn Advertising*, as to which review has been denied.[5]

In any event, to allow the boundaries of the preemptive scope of the FCLAA to remain unsettled for a period of what may well be years—in the face of continuing circuit conflict—while other issues are tried and appealed would only delay resolution of a significant legal issue that should best be resolved now. *See* Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, SUPREME COURT PRACTICE 197 (7th ed. 1993) (even though other issues remained to be decided below, the Court has granted *certiorari* where there was a conflict on a question of law with another court of appeals which would justify review of a final decree or judgment); *Geissal v. Moore Medical Corp.*, 524 U.S. 74, 79 (1998); *United States v. General Motors Corp.*, 323 U.S. 373, 374-377 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-09 (1916); *Forsyth v. City of Hammond*, 166 U.S. 506, 514 (1897); *see also* SUPREME COURT PRACTICE at 197 (*certiorari* granted where nonfinal judgment presented "a novel and important question of law and where petitioner's position, if sustained, would render the decision wholly void"). The need to resolve the conflict among the circuits on this important question of federal law is both immediate and urgent.

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[4] *See* Petition for *Certiorari* at 9 n.3.

[5] *See* p. 1, n.1, *supra*.

Moreover, a large number of local jurisdictions have adopted ordinances banning or restricting outdoor cigarette advertising in the past several years. These measures have spawned a large amount of litigation.[6] This multiplicity of local regulations and conflicting court decisions determining their validity or invalidity is precisely the "diverse, confusing, and nonuniform" result that Congress sought to avoid in passing the FCLAA. *See* 15 U.S.C. § 1331(2). States and local governments adopting such regulations and the advertisers of cigarettes affected by them are in need of guidance from the Court.

3. The City is unable to support the Second Circuit's refusal to "'give effect to [the] plain language'" of FCLAA § 1334(b) in this case. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (citation omitted). This Court, stating that Section 1334(b) "provides a 'reliable indicium of congressional intent with respect to state authority,'" *id.* at 517 (citation omitted), stressed that the task in determining the scope of FCLAA preemption is to construe "the precise language" of Section 1334(b). *Id.* at 523. The Court described this task as "straightforward," *id.* at 524, concluding that there is "no 'good reason to believe' that Congress meant less than what it said" in the plain language of Section 1334(b), *id.* at 522 (citation omitted), and that "the pre-emptive scope of [the FCLAA] is governed

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[6] In addition to *Penn Advertising*, *Federation of Advertising Industry Representatives*, *Lindsey*, and this case, there have been numerous district court cases that have ruled on the application of FCLAA preemption to local laws regulating cigarette advertising. *See, e.g.*, *Rockwood* v. *City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (holding that ordinance regulating outdoor cigarette advertising is preempted by FCLAA); *Chiglo* v. *City of Preston*, 909 F. Supp. 675 (D. Minn. 1995) (same); *Lorillard Tobacco Co.* v. *Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999) (rejecting FCLAA preemption challenge to law regulating outdoor cigarette advertising), *appeal pending*, No. 00-1117 (1st Cir. 2000).

entirely by the express language in [Section 1334(b)]. . . ." *Cipollone*, 505 U.S. at 517; *see also id.* at 521 n.19 (where legislative history suggests an interpretation of FCLAA contrary to plain meaning, that interpretation must be rejected).[7] The Second Circuit, like the Seventh Circuit in *Federation Advertising Industry Representatives*, essentially treated *Cipollone* as having been superseded by subsequent decisions of this Court involving other statutes. *See* Petition for *Certiorari* at 15 n.7; Appendix to Petition for *Certiorari* at 7a-8a, 66a-69a. Nothing in the City's brief justifies such a deviation from *Cipollone* and, of course, any such deviation can only be authorized by this Court itself.[8]

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[7] The Second Circuit's holding not only distorts the plain language of Section 1334(b), but misstates the legislative history to reach a result that Congress never intended. For instance, there is no merit to the court of appeals' conclusion that this Court's citation to the Senate Report to the FCLAA in *Cipollone* justifies the holding of no preemption in this case. While the Senate Report makes clear that preemption does not apply to state laws concerning "the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public places, or *similar* police regulations," S. Rep. No. 91-566, 91st Cong., 1st Sess. 12 (1969) (emphasis added)), advertising regulations are not "similar" to cigarette taxes, minimum-age laws, or smoking restrictions. They are precisely and inescapably what Section 1334(b) singles out as preempted by federal law.

[8] A concurring opinion in *Lindsey* by Judge O'Scannlain, issued after the filing of the petition in this case, relating to later precedent of this Court is annexed hereto as App. 5a-7a. *See also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (rejecting the proposition "that other courts should conclude that our more recent cases have, by implication, overruled an earlier precedent").

CONCLUSION

For the reasons stated above and for those set forth in our petition, it is respectfully submitted that the petition for a writ of *certiorari* should be granted.

Dated: New York, New York
March 20, 2000

Respectfully submitted,

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